IN THE

Supreme Court of the United States

No.

PIEDMONT FIRE INSURANCE COMPANY,
PETITIONER,

versus

HARRY J. AARON, MRS. D. E. ROLES, MRS. WALTER ROOKS, ET AL., RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals of the Fourth Circuit to be reviewed carrying the above caption was rendered in a civil cause on November 8th, 1943, on which a rehearing was denied January 10th, 1944.

II.

STATEMENT OF THE CASE.

The petition filed herewith brings to the attention of the Court for review the action of the Circuit Court of Appeals for the Fourth Circuit both in affirming certain rulings of the District Court contrary to the position taken thereon by the appellant and dismissing on its own motion a Declaratory Judgment proceeding instituted by the appellant against the appellees and others in this cause; and also the action of the Circuit Court of Appeals in considering and acting upon certain testimony, or findings of fact, not certified from the District Court but brought to its attention through means of affidavit and statements of counsel submitted at the hearing or through briefs filed in the appellate court (Record 98).

From an examination of the record filed with the petition for *certiorari* in this Court it will appear that the appellant, the Piedmont Fire Insurance Company, through its local agent at Newport News, Virginia, on June 15, 1942, issued through the request of the appellee, Aaron, made by his agent and broker, a written binder for a Furriers' Customers Insurance Policy (Record 3), the purpose of the binder being to protect those concerned pending the issuance by the appellant of its formal policy which was to be delivered in the usual course and in at least thirty (30) days from the date of the binder. On June 18th following the property consisting of fur garments belonging to sundry customers of Aaron (estimated in the pleadings in the case as numbering from 934 to 976) then held in storage by him in his store, vault or warehouse at Newport News, Virginia, was injured or destroyed as a consequence of a fire there occurring of unknown origin, and it is as a result of such fire and the losses occasioned thereby that the litigation here involved arose. Two suits were brought, namely, a De-

claratory Judgment proceeding instituted by the appellant in the United States District Court against the appellee, Harry J. Aaron, and sundry other parties, including the 934 bailors mentioned, and the other a suit of Harry J. Aaron against Piedmont Fire Insurance Company, which was instituted in the State court and subsequently removed to the District Court upon the petition of the appellant upon the grounds of diversity of citizenship.

The Declaratory Judgment proceeding was instituted in the United States District Court on September 12, 1942, through the filing with the Clerk as of that date the petition required, the form and allegations of which, found in the record commencing at page 2, give a complete resumé of the appellant's case, to which special reference is here made, the salient features being as follows:

(a) That it had issued a binder for an Inland Marine insurance policy at the instance of Aaron, which, under its express terms, provided protection severally to numerous persons who had deposited with the applicant for safe storage, such providing no primary insurance of any character on the property of the appellee, Aaron;

(b) That from an investigation made subsequent to the fire the appellant had reached the conclusion that the binder for the contract of insurance in question had been procured by fraud, including misrepresentation and concealment on the part of the appellee, Aaron, and his broker, which allegation of fraud was definitely stated in the complaint;

(c) That from further information so acquired subsequent to the fire it was advised that it was not the sole insurance company interested or bound upon the property concerned and consequently there was no way for it to ascertain the extent of its contractual obligations to those affected by the loss except through the means of a suit such as it was then instituting;

(d) That there was reasonable apprehension of numerous suits being instituted against the appellant, including the appellee, Aaron.

III.

SPECIFICATIONS OF ERROR.

1. The Court erred in sustaining the dismissal by the District Court in the first instance from a jurisdictional standpoint (*Aetna* v. *Haworth*, 300 U. S. 227; *Maryland Casualty Co.* v. *Consumers Finance Service*, 101 Fed. (2d) 514), and in the second place in the dismissal thereof after jurisdiction had been assumed and the cause had been permitted to proceed at the expense of time and money to the litigants (*Brillhart* v. *Excess Ins. Co. of America*, 316 U. S. 491).

2. The Court erred (a) in sustaining the District Court in its holding that the appellee, Aaron, was entitled to a trial by jury as a matter of right in the Declaratory Judgment action involved in the first instance as the issues presented in such Declaratory Judgment complaint presented issues purely equitable in their nature and demanding equitable relief through the judgment of the Court;

(b) in sustaining the action of the District Court in refusing to grant the motion of the appellant that the consideration of the issues presented in Civil Action No. 16, under which a jury trial might be demanded, should be postponed until the equitable issues presented in Civil Action No. 9 should have been determined (*American Life Ins. Co.* v. *Stewart*, 300 U. S. 203-216).

3. That the Court erred in sustaining the holding of the District Court that the question as to liability of the insurer under the facts alleged in the pleadings pre-

sented a question for the jury to determine as under the facts alleged in the pleadings the policy of insurance concerned not a single individual but many individuals, each having a present right of action against the insurer for their individual loss, if sustained. Under the Declaratory Judgment proceeding the rights of each of these litigants would be protected, while the common law action instituted by the appellee was ineffectual to grant relief. Federal Rules of Civil Procedure, Rule 23. *National Hairdressers, etc.*, v. *Philad Co.*, 41 F. Supp. 701; *Carpenter* v. *Edmondson*, 92 Fed. (2d) 895-897; *Crosley Corp.* v. *Hazeltine Corp.*, 122 Fed. (2d) 925; *Pacific Fire Ins. Co.* v. *Reiner*, 45 F. Supp. 703.

4. That the Court erred in sustaining the holding of the District Court that under the facts presented in the record, and subsequently, the rights of the parties might be determined in the action of law as the Court thereby ignored the respective rights of the parties under the express terms of the policy of insurance before the Court for construction.

5. The Court erred in holding with the District Court that a recovery under the "binder" mentioned in the record under the allegations and pleadings of this case could be had at law, and the consideration of such question, did not involve a purely equity issue.

6. The Court erred in considering and accepting as a factual basis or background for its approval of the action of the District Court an *ex parte* affidavit as to facts not found in the record as certified up from the District Court, namely, that the affiant had been informed that the Judge of the District Court in reaching his decision to dismiss the Declaratory Judgment action had been influenced by certain facts alleged to have been stated at a pre-trial conference when there was no mention of a

pre-trial hearing before the Court either in the opinion or order of the Court, or record, so certified.

IV.

ARGUMENT.

It is respectfully submitted that the pleading here considered definitely states a case which on its face entitles the litigant to ask relief of the District Court under the Federal Declaratory Judgment Act, 28 U. S. C. A., Section 400 (3) (*Aetna L. Ins. Co.* v. *Haworth*, 300 U. S. 227, 81 L. Ed. 617; *Brillhart* v. *Excess Ins. Co. of America*, 316 U. S. 491-502, 86 L. Ed. 1620), and moreover the issues presented were such as to entitle a litigant to equitable relief, such relief as belongs to a court of chancery alone, such in fact as was never assumed to be appropriated by the common law court. Consequently, we contend that the District Court committed error when it refused to grant the appellant's motion to strike the pending request of the appellee, Harry J. Aaron, for a trial by jury (Record 86).

We also contend that the District Court again committed error when refusing the companion motion made on behalf of the appellant that the common law action against the Piedmont Fire Insurance Company, originally brought in the State court, should be dismissed upon the ground that the pleadings therein failed to make out a case upon which relief could be granted (Record 86).

These two motions may be and should be considered as corollaries of each other, for obviously if the Court should be of opinion that the complaint in the Declaratory Judgment cause presents issues which were solely cognizable in a court of chancery a jury trial such as contemplated under the Seventh Amendment to the Constitution would be inappropriate [*Home Insurance Co.*

v. *Virginia-Carolina Chemical Co.*, 113 Fed. 1; *Brown, et al.*, v. *Pacific Life Insurance Co.*, 62 Fed. (2d) 711 (4 C. C. A. 1933)], and for like reason the common law action instituted by the appellee, Aaron, could not be sustained as the pleading admits on its face that the plaintiff was not in possession of a complete contract of insurance with the insurer, but merely such a contract as could only be enforced in a court of equity (See Virginia Statute, Section 6094), under which action was brought [Appendix] and the following decisions selected from this Court and the Supreme Court of Appeals of Virginia cited in support.) *Taylor* v. *Merchants F. Ins. Co.*, 9 Howard 390, 13 L. Ed. 187; *Union M. Ins. Co.* v. *Commercial M. M. Ins. Co.*, 19 Howard 318, 15 L. Ed. 636; *Franklin F. Ins. Co.* v. *Colt*, 20 Wallace 560, 22 L. Ed. 423; and *Eames* v. *Home Ins. Co.*, 94 U. S. 621, 24 L. Ed. 289; and *Wooddy* v. *Old Dominion Ins. Co.*, 31 Gratt. 362; *Haskins* v. *Agricultural F. Ins. Co.*, 78 Va. 700; *Haden* v. *Farmers & M. Fire Asso.*, 80 Va. 683; *Interstate F. Ins. Co.* v. *McFall*, 114 Va. 207, and *Natl. Liberty, etc.*, v. *Jones*, 165 Va. 606.

The third motion made on behalf of the appellant, which was also refused by the District Court, was directed to an alternative suggesting the postponement of consideration of the common law action until the Court should have determined the equitable issues involved and presented in the Declaratory Judgment proceeding, this suggested motion being made under the authority of *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203.

It has generally been held that if there is no pending suit between the same parties, or if it is not plainly manifest in case there is such suit that the relief which can be obtained in such is as fully adequate and complete as can be afforded in the Declaratory Judgment proceeding a trial court exceeds its discretion when declining to entertain such suit. *Maryland Casualty Co.* v. *Consumers Finance Service* (3 C. C. A.), 101 Fed. (2d) 514;

United States Fidelity & G. Co. v. *Koch* (3 C. C. A.), 102 Fed. (2d) 288; *Employers' Liability Assur. Corp.* v. *Ryan* (6 C. C. A.), 109 Fed. (2d) 690 [311 U. S. 722, 85 L. Ed. 470]; Federal Rules of Civil Procedure, Rule 57.

THE OPINION AND ORDER OF THE DISTRICT COURT.

In view of the circumstances that the Circuit Court of Appeals affirmed the action of the District Court in dismissing the Declaratory Judgment proceeding instituted by the appellant and in substituting in its place and stead the common law suit brought by the appellee, Aaron, against the appellant, the Declaration in which (Record 51) presents the sole pleading of affirmative nature upon which the cause is to be continued and tried when remanded to the District Court, and especially because the Circuit Court of Appeals in reaching its decision considered a certain affidavit and statements respecting certain alleged settlements made by the appellee, Aaron, which were stated to have affected or influenced the District Judge in dismissing the appellant's suit when the record fails to show that such matters were before the Court, we deem it necessary to briefly comment upon the opinion and judgment of the District Court.

We take from the order [R. 86] the reasons assigned for the action taken and will consider such *seriatim*:

> (a) "all rights of the parties had fully matured before either one of the actions herein were instituted".

The Court seems to have been under the impression a Declaratory Judgment proceeding could not be entertained where the rights of the parties had matured before the institution of the suits concerned. This was an early view taken by some courts before the scope and purpose of Declaratory Judgment actions had developed.

We deem it unnecessary to cite any of the numerous cases decided by the Federal Courts as to the error of this theory.

(b) "the pleadings do not present a proper case for declaratory judgment".

It is possible that the Court may have reached this conclusion upon its erroneous conception of the scope and purpose of the Declaratory Judgment Act just mentioned. However, as heretofore stated, the complaint in appellant's action would seem to state as clear and perfect a case for the granting of declaratory judgment relief as can be conceived of. (See authorities cited in accompanying petition and herein, *supra*).

(c) "that in Civil Action No. 16 (the common law action brought by Aaron) every defense disclosed by the pleadings in Civil Action No. 9 (the Declaratory Judgment suit) is fully available to Piedmont Fire Insurance Company".

It will be recalled that the common law action here referred to was a suit under the Virginia Statute, Section 6094, found in the Appendix. It was an action brought by Aaron by and for himself against the appellant. The form of the action as definitely disclosed in the Statute referred to was intended to be used *only* where the plaintiff was in *possession* of an insurance policy issued by the defendant. The Statute itself was adopted to save the pleader the necessity of following the prolix common law forms of declaration on insurance policies long prevailing in the State of Virginia and in England. Certainly the declaration as found in the record (page 50) could do no more standing alone than to present a single issue to settle a single claim between the two litigants. The District Court seems to have ignored the existence of other parties defendant to the

Declaratory Judgment proceeding though such parties were then before the Court and had joined issue in the Declaratory Judgment proceeding with the plaintiff and asked for protection by the Court. (Record 43.) And while the common law action is predicated upon a specific contract therein mentioned, namely, the Furriers' Customers Insurance Policy, a copy of which was filed with the declaration (Record 51), the order of the Court directs that when a trial is had the issues to be submitted to a jury for determination shall be whether or not an alleged *binder*, the identification of which is obtained from an exhibit filed with the Declaratory Judgment suit, and matters incorporated in such binder, "by reference" [presumably the Furriers' Customers Insurance Policy] and other facts "*constituted* a binding contract between the parties". It is submitted that the order of the Court in itself shows the necessity for a Declaratory Judgment as to the alleged contract, and consequently the action of the Court in so dismissing the Declaratory Judgment proceeding and substitution for such the form of action mentioned was an abuse of discretion on the part of the District Judge.

The action of the District Court denied to the litigant a privilege and remedy provided by Congress through the Declaratory Judgment Act, and this action of the Court now approved by the Circuit Court of Appeals of the Fourth Circuit (Record 98) is in conflict with the views of this Court, and out of harmony with the rule of construction adopted in other Judicial Circuits. See Petition B (1).

THE OPINION OF THE CIRCUIT COURT OF APPEALS (Record 98).

In considering the opinion in the Circuit Court of Appeals we follow the headnotes as carried in the advance sheets, 138 Fed. (2d), commencing at page 132, and treat the first three collectively.

The Court holds: [1] whether an insurer is liable on a *binder* procured by fraud whether arising in an action of an assured against the insurer or the latter's suit for declaratory judgment *presents a question for the jury;* [2] ordinarily that when the defense of fraud is interposed to an *action on a policy* and such action is imminent or pending, there is no occasion for equitable relief and the parties' rights will be left to be determined in the suit at law; [3] the Federal Declaratory Judgment Act expressly provides for trial by jury.

COMMENT.

Of course, no question can be raised in respect to [3]. When we consider, however, [1] and [2] we submit with great respect that there is a fallacy present due apparently to the misapprehension of the terms of the actual policy involved in the instant case. Strange to say, in neither the District Court nor the Circuit Court of Appeals, in both of which opinions were rendered (Record 83 and 98), is the *contract of insurance identified* or reviewed. The real and substantial question at issue is therefore begged. It might be conceded that if the action in the instant case had involved the usual standard fire policy, or a standard life insurance policy, such as were before this Court in the cases cited by the learned Judge, the matter at issue could not be questioned, as this Court has repeatedly held that the defense of fraud *under* an *insurance policy* could be made in the common law courts and the issue presented goes to the jury. But where there is no policy, and the very nature and terms of the contract itself is in dispute, does the rule as stated apply?

Headnote [4] of the opinion of the Circuit Court of Appeals reads as follows:

"Insurance

"Recovery at law may be had upon a contract for temporary insurance such as is evidenced by a binder."

The Court says:

"Contention is made that recovery on the binder could be had only in equity, and that under the Rules of Civil Procedure trial by jury was not mandatory for that reason. It has long been established, however, that recovery at law may be had upon the contract for temporary insurance which the binder evidences." (Citation of authorities follow.)

An analysis of the administration of insurance law and the construction placed upon an insurance contract in different jurisdictions would seem important when considering the quoted paragraph of the opinion. In many States it has been held that an action at law may be had on a contract for temporary insurance, evidenced by a "binder", but it is believed that an examination of these cases, including those cited by the Court, will definitely show that under the facts reviewed there has either been a promise in the binder for the "continuance of a former policy" where all of the terms of the contract are known and agreed upon, or otherwise the binder itself carries adequate information to show that the minds of the parties concerned have met according to the statement recited. It is believed, however, that the rule established by the court and now prevailing in Virginia both federal and state hold to the contrary. If this observation be correct it would seem that the rule adopted and followed in the instant case by both the District Court and the Circuit Court of Appeals is contrary to the rule which has been followed in this State for a century. The cases to which we refer are cited herein,

supra, page 23. These cases include the single case from Virginia found in the opinion quoted *supra*, i. e., *National Liberty Ins. Co.* v. *Jones*, 165 Va. 606, 183 S. E. 443. In the instant case no policy was issued, merely a letter from the insurer "binding" the risk pending the issuance of the policy mentioned which was to follow. Even the form of the policy which is to fix the rights of those concerned, as the beneficiaries thereunder, is not agreed upon by the litigants.

Moreover, the policy sought of the appellant in the instant case [the terms of which we believe will be accepted as fixing the rights of the parties concerned pending the issuance of the policy to follow] bears no similarity whatsoever to the class of policies involved in the cases found in the opinion, *supra*. The very difference between the two classes of policies, or contracts of insurance, dealing as they do with different persons and providing payment to those entitled thereunder in a different way, would necessarily demand a different construction of the policy itself, and a different forum for the settlement of the claims of those concerned. Certainly if it was desired to avoid 900 or more suits brought by those entitled to sue the insurer a single common law action could not grant relief. In the *Reiner Case*, *supra*, there was a common law action in the State court for less than $20.00 with possibly 5,000 parties in interest. A declaratory judgment suit as here was the result.

The Furriers' Customers Policy does not provide under its terms for the ascertainment of loss and damages occasioned as a result of fire or other injury to property insured, such as by moths, etc., through appraisal of the loss as in the ordinary standard fire policy. In fact, the policy carries no appraisal or arbitration clause at all (Record 25-31). The policy is merely a blanket policy providing for the insurer to pay, at its election, to the assured or its customers the *amount of cost to replace* or *repair* any fur garment with materials

of like kind and quality, such *cost* not to exceed the amount of the storage receipt which the bailee has issued to the bailor, it expressly provides that this loss, when ascertained, may, *at the option of the insurance company*, be paid or adjusted with the customer or bailor.

Moreover, the policy in fact, and in law, provides for primary insurance to the customers individually, not collectively, and, moreover, the policy expressly excludes by its terms liability on the part of the insurer for any property belonging to the bailee, or any subsidiary or affiliate of such. A cursory examination of the policy itself will show that it is provided and issued for the protection of numerous parties who at the time of loss occupy the relation of bailors to the applicant thereof, and that such provides for no aggregate payment. It is a several and not a joint liability, however viewed.

It would seem therefore that the observations carried in the opinion of the learned Judge of the Circuit Court of Appeals in headnotes [1-2-4] cannot be accepted as conclusive in establishing the law of the case.

Similar Policy Construed by Federal Court in Louisiana.

A similar policy involving the identical question now before this Court was before the United States District Court of Louisiana under the companion inland marine policy, being the Inland Marine Pawnbrokers Policy, which had been issued to protect the pledgors of a pawnbroker. The District Court held that the bailors who had their property in storage under the pawnbrokers' ticket were necessary parties in an action brought by the insurance company seeking a declaratory judgment, *Pacific Fire Insurance Co.* v. *Reiner* (1942), 45 F. Supp. 703. The same rule, or construction, we believe, has been generally followed by the courts where the relationship between the insurer, the insured, and the beneficiary under the policy, or contract, has been the same. We re-

fer to the following cases: *Century Ins. Co., Ltd.*, v. *First Natl. Bank of Hugh Springs, Texas* (5 C. C. A., 1939), 102 Fed. (2d) 138; *Central States Grain Co-Op.* v. *Nashville Warehouse and Elevator Corp.* (7 C. C. A., 1931), 48 Fed. (2d) 138. These cases do not conflict with those decisions arising under the ordinary policy issued to a warehouseman, such as *Boyd* v. *McKee*, 99 Va. 72; *Home Ins. Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527. *The terms of the insurance contract differs.*

National Liberty v. *Jones, supra,* recognized the rule followed in Virginia and by this Court. The case was not brought on a binder or under a policy but for damages alleged by reason of a non-delivered policy promised. In other words, on an action such as recognized in *Sanford* v. *Orient Insurance Co.*, 174 Mass. 416, 75 A. S. R. 358-360. For distinction of the two forms of action see Couch on Insurance, Volume 8, Section 1971.

The allegations in the pleading in the common law case brought under Section 6094 of the Code would estop, not facilitate, an amendment permitting the plaintiff therein to sue for breach for non-delivery of a policy. (See Appendix to Petition.) The situation is not similar to, but contrary to, the facts before this Court in *Northern Assurance Co.* v. *Grand View Building Assn.*, 203 U. S. 106.

Under the fifth and sixth headnotes of the opinion the Court proceeds to say that there was no occasion for the District Court to retain the Declaratory Judgment suit as the only remaining issue "would be tried in the same way in the action to recover on the binder as in the suit for declaratory judgment" and therefore there was no occasion to complicate the record by retaining such suit on the docket so "the order dismissing that portion of the consolidated proceeding was properly entered", i. e., the order appealed from, found in the record (page 86).

Here again the lack of interpretation of the contract

is of significant importance as well as the action of the Court in accepting and passing upon evidence or statements of fact not found in the record nor contained in the pleadings. The action of the Court in respect to these matters is among the questions presented in the accompanying petition for *certiorari*.

These and other questions presented in the petition were brought to the attention of the Circuit Court of Appeals in the petition for rehearing found in the record.

CONCLUSION.

In conclusion, it is respectfully submitted that for the reasons assigned a writ of *certiorari* may be granted that this Court may review the decision of the Circuit Court of Appeals for the Fourth Circuit and reverse the same as prayed for in this petition.

ALEXANDER H. SANDS,
Richmond, Virginia,
Counsel for Petitioner.
CHARLES E. FORD,
Newport News, Virginia,
(On the Brief).

MAR 6 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 705.

PIEDMONT FIRE INSURANCE COMPANY, *Petitioner,*

v.

HARRY J. AARON, MRS. D. E. ROLES, MRS. WALTER ROOKS ET ALS.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

MEMORANDUM FOR RESPONDENT, HARRY J. AARON.

ALLAN D. JONES,
Newport News, Virginia.

TAZEWELL TAYLOR,
Norfolk, Virginia,
Counsel for Harry J. Aaron, Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinions below	1
Questions presented	1
Statement	2
Argument	9
Conclusion	13
Appendix	14

CITATIONS.

CASES:

Aetna Casualty & S. Co. v. *Quarles* (4th Cir.) 92 F. 2d. 321	9, 10
Maryland Casualty Co. v. *Boyle Const. Co.* (4th Cir.) 123 F. 2d. 558	9
Brillhart v. *Excess Insurance Co.*, 316 U. S. 491	9
Lord v. *Veazie*, 8 How. 250	12
South Spring Hill Gold Mining Co. v. *Amador Median Gold Mining Co.*, 145 U. S. 301	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 705.

PIEDMONT FIRE INSURANCE COMPANY, *Petitioner*,

v.

HARRY J. AARON, MRS. D. E. ROLES, MRS. WALTER ROOKS ET ALS.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

MEMORANDUM FOR RESPONDENT, HARRY J. AARON.

OPINIONS BELOW.

The opinion of the District Court appears in the Record at page 83. The opinion of the Circuit Court of Appeals is in the Record at page 99. A petition to rehear was denied by the Circuit Court of Appeals (R. 104).

QUESTIONS PRESENTED.

While the petitioner specified error, in variation, the ground of the specifications is the charge that the Court of Appeals erred in sustaining the District Court's dis-

missal of the petition for declaratory judgment, holding that in the exercise of a sound discretion a proper case was not presented.

STATEMENT.

The error relied upon in seeking the writ is alleged to be that of the Circuit Court of Appeals for the Fourth Circuit affirming the District Court which had dismissed a petition for declaratory judgment filed therein by the Piedmont Fire Insurance Company. The action of the District Court was taken at a time when in that court two pending causes had been consolidated. One cause arose in a Virginia state court where the plaintiff in a common law action sued the Piedmont Fire Insurance Company upon a contract of insurance. Shortly after the institution of that suit, and before its removal, the defendant in that action filed its petition for a declaratory judgment in the federal court. After the removal of the suit from the state court the pleadings having been made up, the causes were consolidated, the court saying (R. 71), "it appearing that they involve common questions of law and fact and that consolidation will reduce cost and delay". The controversy centered in both actions upon the contract sued upon in the state court, which contract the petitioner, Piedmont Fire Insurance Company, asked the Court to declare null and void (R. 10) "and that the plaintiff, Piedmont Fire Insurance Company, is not liable under said binder either to the defendant, Harry J. Aaron, or the defendants, Mrs. D. E. Roles or others similarly situated".

The District Court had jurisdiction of the petition for declaratory judgment. There seems to be confusion in the minds of counsel for petitioner when it is said that the court having jurisdiction, petition being filed, it was encumbent upon the court to proceed in that cause. The District Court, in the exercise of its discretion, determined upon the pleadings and the factual situation that a jury trial could be had in the common law action which was removed from

the state court; that in that action all issues between the parties could be determined; and that the petitioner could present all defenses in the common law action and have the same relief therein as it might have in the petition for declaratory judgment. The lower court declined to sustain the position of the petitioner that the common law action brought over from the state court could not be heard for the reason that no policy of insurance had been delivered at the time of the fire; that the only remedy that the insured had was a suit in equity requiring the delivery of the policy; and that any suit by the insured against the company would have to be upon the policy and not upon the binder, the contract upon which the state court action was rested, and the answer of the insured to petition for declaratory judgment was based.

In the answer of Harry J. Aaron to the petition of the Piedmont Fire Insurance Company filed in the District Court, the second defense asserted was as follows (R. 33):

> This defendant says that this Court should not take jurisdiction of this cause, for the reason that there is now pending in the Circuit Court for the City of Newport News, Virginia, an action of trespass on the case *in assumpsit* under the style of "Harry J. Aaron v. Piedmont Fire Insurance Company, a foreign corporation". In that suit process issued prior to the institution of this cause * * * That in the suit pending in the state court the same issues will arise as are alleged to be the issues in the complaint filed in this cause, the simple issue in each case being as to whether or not Harry J. Aaron held a valid binder for $300,000.00 insurance on a stock of customer's furs at the time of the fire from the Piedmont Fire Insurance Company, a corporation organized under the laws of the State of North Carolina, * * *

It will be seen, therefore, notwithstanding the assertion in the petition and brief, that the District Court of its own motion did not dismiss the declaratory judgment proceeding; that at the earliest opportunity, which arose when

the defendant, Harry J. Aaron, was required to answer the petition filed in the federal court, his position was that the court should not take jurisdiction for the reasons which he assigned, which defense the District Court sustained and the Circuit Court of Appeals affirmed, and denied petition for rehearing. The petitioner now says it was surprised at the action of the court, taken as it says "on the court's own motion". At the earliest moment it was advised of the position of the defendant in this respect. The petition for declaratory judgment was filed on September 12, 1942, and the answer of the defendant, Harry J. Aaron, was filed on October 3, 1942.

This preliminary discussion brings us to the consideration of the error relied upon in the petition for the writ of certiorari in this cause. Judge Way in the District Court considered three motions and stated the motions in a written opinion in the following language (R. 83):

> That the motions (1) to strike the request of Harry J. Aaron for trial by jury, (2) to dismiss the action of said Harry J. Aaron against Piedmont Fire Insurance Company on the ground that in the state of the pleadings said Aaron has failed to make out a case upon which relief can be granted, and (3) for a declaratory judgment, should be denied.

These several motions had been argued. The first motion that the court disposed of appeared in the answer of Harry J. Aaron to the petition for declaratory judgment, the answer concluding with this paragraph (R. 37):

> And now having fully answered the complaint, this defendant says that for the reasons hereinbefore stated no decree should be entered herein other than a dismissal of this cause, that should the Court take jurisdiction of the cause and proceed to hear it, that then this defendant asks for, as he is entitled to have, a jury trial on the issues herein involved.

The granting to Aaron of a jury trial and overruling motion addressed to the common law declaration were not appealable at that stage of the litigation.

In the state of the record at the time that Judge Way rendered his decision, matters before the court for decision stated as above were open and the court in each instance denied the motion, holding that a proper case for declaratory judgment was not presented. (R. 83)

> It is the view of the Court that the pleadings do not present a proper case for a declaratory judgment. All rights that the insured can ever have under the binder matured as a result of the fire before Civil Action No. 9 was instituted. Civil Action No. 16 was, in fact, instituted in the state court before Civil No. 9 was instituted here. Every defense disclosed by the pleadings in No. 9 is fully available to the insurer in No. 16, and, in fact, No. 9 raises no issue that is not presented in No. 16.

Further, the court declared:

> In the trial of the case before the jury the insured will have, as in any other similar case, the burden of establishing a valid, binding contract between him and the insurer existing at the time the fire occurred * * * That issue of fact, as I view the matter, is comparatively simple and, as already stated, all rights of both parties had fully matured before any action was instituted by either party.
>
> In the event it is determined that the binder issued on June 15, 1942, together with the extrinsic evidence incorporated therein by reference, constituted a binding contract between the Insurance Company and the insured, the issue or issues of fact concerning authority, alleged fraudulent misrepresentations and concealment by the insured can be presented to the jury for decision upon appropriate instructions in the same manner that such issues of fact are usually and normally presented in a suit upon an insurance contract.

The court went on to say that if the recoverable loss could not be agreed upon, assuming that under the instructions of the court the jury found a valid and subsisting contract for insurance, that then the court would refer the question of damages to a master pursuant to Rule 53, further saying:

> By so doing, a long, tedious jury trial and the danger of the jury becoming confused upon the issues respecting liability, can thereby be avoided. In that connection, I understand that approximately nine hundred pieces of fur are alleged to have been destroyed or damaged in the fire in question. Such a reference to a competent master will also afford the parties increased opportunity to stipulate with respect to many of the items of damage.

The foregoing quotations are from the opinion of the court, the order entered held (R. 86):

> for reasons stated in writing and filed with the papers in these causes on the 28th day of April, 1943, that all rights of the parties had fully matured before either one of the actions herein were instituted; that the pleadings do not present a proper case for declaratory judgment, and that in Civil Action No. 16 every defense disclosed by the pleadings in Civil Action No. 9 is fully available to Piedmont Fire Insurance Company; * * *

dismissed the complaint for declaratory judgment, placed the case on the trial calendar and stated that the issue would be submitted to a jury as to whether or not the alleged binder and the matters incorporated therein by reference, and any other facts, constituted a valid, binding contract between the parties, and whether or not there is liability upon the defendant for the alleged losses resulting from said fire. It was further ordered:

> That the issue as to the amount of damages, recoverable loss, to Aaron, if it be found that he had a valid and subsisting contract at the time of the fire, will be referred to a master to make report thereon pursuant to the provisions of Rule 53 of the Federal Rules of Civil Procedure.

Counsel for respondent is at a loss to understand the statement made in the petition for rehearing filed in the Circuit Court of Appeals appearing at the top of page 2, there it is stated:

> The Piedmont has never denied liability in this case, but to the contrary, it has asked the Court to pass upon its obligations, if any, to those who claimed rights under its Furrier's Customers' Policy, * * *

And in the same petition which appears to have been made a part of the Record in this cause by being bound with the Transcript of Record, it is said at page 23:

> It has been asserted both in the pleadings and through briefs that the Piedmont Fire Insurance Company had denied liability under the terms of the alleged contract. It is submitted that the Record gives no substantiation as to the correctness of this allegation.

Evidently, from these references, counsel for petitioner seeks to impress this court with the thought that they are in an interpleader position, not denying liability on the binder contract, but not knowing to whom the funds should be paid. We quote from page 10 of the Record the second prayer of the plaintiff as follows:

> (2) That, specifically, this Court decree and declare that said binder so issued on June 15, 1942, in the name of the plaintiff, Piedmont Fire Insurance Company, by its agent, Y. K. Gayle, at Newport News, Virginia, at the instance and request of the defendant, Harry J. Aaron, be declared null and void, and that the plaintiff, Piedmont Fire Insurance Company, is not liable under said binder * * *

In what more definite language could a denial of liability be expressed than in that which we have quoted. We would again refer to page 3 of the petition filed in this court for the writ and say that the question presented to the court is not in accordance with the factual situation as disclosed by the pleading. From the outset, the defendant, Harry J. Aaron, contended and so answered, not that the court did not have jurisdiction to entertain the petition, but in the exercise of a sound discretion it should not determine and hold that a proper case for a declaratory judgment was presented.

It would appear, therefore, that the only question here is whether there was an abuse of discretion in the District Court in dismissing the suit for declaratory judgment. Not on its own motion, though the court at any time could look into the pleadings in a case and determine whether it was a proper case for the entry of the declaratory judgment. The appellate court affirmed the District Court.

The Court of Appeals in its opinion said (R. 99):

> It is clear, we think, that the order appealed from should be affirmed. The question as to whether the insurance company was liable on the binder was one for trial by jury whether arising in the action on the binder or in the suit for declaratory judgment. "Ordinarily, when the defense of fraud may be interposed to an action at law on the policy and such action is imminent or pending, there is no occasion for equitable relief and the parties will be left to their rights as determined in the suit at law."

The court further held that the contention made that recovery on the binder could only be had in equity was not sound, saying:

> It has long been established, however, that recovery at law may be had upon the contract for temporary insurance which the binder evidences.

And then concluding:

> Since there was no occasion to retain the declaratory judgment suit for the determination of the rights of those who had stored furs with Aaron or the liability of the other insurance companies, and since the only issue remaining in the case would necessarily be tried in the same way in the action to recover on the binder as in the suit for declaratory judgment, there was no occasion to complicate the record of the procedure by retaining that suit, and the order dismissing that portion of the consolidated proceeding was properly entered. * * * The granting of declaratory relief, however, is a matter resting in the sound discretion of the court; and the discretion is properly exercised by dis-

missing the suit when it is apparent that it will serve no useful purpose.

We have the District Court and the Court of Appeals on the record which is here presented, concluding that the exercise of sound discretion required the court to dismiss the petition for declaratory judgment, as it would serve no useful purpose. Upon petition for rehearing the appellate court adhered to its former decision and denied the petition.

ARGUMENT.

In sustaining the ruling of the District Court in dismissing the declaratory judgment proceeding, it was said:

> The granting of declaratory relief, however, is a matter resting in the sound discretion of the court; and the discretion is properly exercised by dismissing the suit when it is apparent that it will serve no useful purpose.

This was the concluding paragraph of the opinion in the Court of Appeals, citing *Aetna Casualty & S. Co.* v. *Quarles*, (4 Cir.) 92 F. 2d. 321; *Maryland Casualty Co.* v. *Boyle Const. Co.*, (4 Cir.) 123 F. 2d. 558; *Brillhart* v. *Excess Ins. Co.*, 316 U. S. 491, 494. In *Brillhart* v. *Excess Ins. Co.*, *supra*, Mr. Justice Frankfurter said:

> Although the District Court had jurisdiction of the suit under the Federal Declaratory Judgments Act, it was under no compulsion to exercise that jurisdiction. The petitioners motion to dismiss the bill was addressed to the sound discretion of the court. * * * Ordinarily, it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties.

In the light of this pronouncement it must be concluded that if two causes, between the same parties, are in the same federal court, the court may in its discretion refuse

to exercise its jurisdiction and grant a declaratory judgment.

In the opinion of the Brillhart case it is noted that *Aetna Casualty & S. Co.* v. *Quarles*, C. C. A. 4 Cir. 92 F. 2d. 321, is cited with approval. The court further said:

> We do not now attempt a comprehensive enumeration of what in other cases may be revealed as relevant factors governing the exercise of a district court's discretion. It is enough that it appears from the record before us that the District Court did not consider whether, under applicable local law, the claims sought to be adjudicated by the respondent in this suit for a declaratory judgment had either been foreclosed by Missouri law or could adequately be tested in the garnishment proceeding pending in the Missouri state court. This was a matter for determination, certainly in the first instance by the District Court. Nor did the Circuit Court of Appeals, in reversing the judgment of the District Court, purport to find that under controlling Missouri law the issues set up by the respondent in this suit could not be contested in the pending Missouri proceeding.

No just criticism can be made of the finding of the District Court which was affirmed by the Circuit Court of Appeals that the issue in the two cases in that court was identical and that there was no occasion for a declaratory judgment as the plaintiff in the bill was afforded all the relief in the trial of the state court action removed to the federal court that it might have had in a declaratory judgment proceeding.

Mr. Justice Douglas in a concurring opinion in the Brillhart case said:

> The exercise of jurisdiction under the Federal Declaratory Judgment Act is certainly not compulsory; it is discretionary. Borchard Declaratory Judgments, 2d Ed. 312.

The factual background in the instant case is in marked contrast with that of the Brillhart case. Here it abun-

dantly appears from the record of the trial court that the District Court did carefully consider the claims sought to be adjudicated by the petitioner in its suit for a declaratory judgment, and that said claims could adequately be tested in the common law action and so found.

The dissenting opinion of Mr. Chief Justice Stone, concurred in by Mr. Justice Roberts and Mr. Justice Jackson, is not in conflict with the majority opinion so far as the instant case is concerned. Applying both the prevailing opinion and dissent to the situation which arose when the two cases were consolidated, and all of the facts as disclosed by the pleadings were before the District Court, the Court had full opportunity to examine the same, which it availed itself of, and found in the exercise of a sound discretion, that no case was presented for a declaratory judgment.

It is contended in the petition for the writ, in this cause, that the Circuit Court of Appeals adopted as a basis for its ruling facts which were presented to the Circuit Court of Appeals by affidavit of the respondent, and that this constituted error. The record in the case does not contain the affidavit. We append it to this brief. The Court of Appeals said that an affidavit had been filed with that court, the averments of which "are not controverted by the insurance company". (R. 99)

This affidavit showed that of 976 customers who held storage receipts all except ten had settled their claims with Aaron under the storage certificates, exhibited at page 22 of this record. The Court further said in its opinion:

> It was stated, without contradiction, that the situation at the time of the pretrial conference preceding the entry of the order of dismissal was not substantially different.

This matter developed in the Circuit Court of Appeals and became a matter of proper inquiry. If it were true that the only claimant under the insurance policy was Aaron, the

court was entitled to know that and if at the time of the dismissal of the declaratory judgment proceeding the same situation substantially obtained and had controlling influence in the dismissal of the declaratory judgment proceeding by the District Court, in determining whether the District Court had exercised a sound discretion, this was a fact, in relation to the litigation, of which the Circuit Court of Appeals of its own right, and on its own motion, might inquire.

In *Lord* v. *Veazie*, 8 Howard 250, 12 L. Ed. 1067, it was held that it is not contempt of court to bring to the attention of the court the status of a case under consideration if there remained little or no controversy, and that a suit may be shown to be fictitious either by an inspection of the record or by evidence *aliunde*, or by both.

In *South Spring Hill Gold Mining Company* v. *Amador Median Gold Mining Company*, 145 U. S. 301, 36 L. Ed. 713, it was brought to the attention of the court that since the decision in the Circuit Court, the control of both corporations, parties to the suit, had come into the hands of the same persons. The court said:

> We cannot, however, consent to determine a controversy in which the plaintiff in error has become the *dominus litis* on both sides. We assume that it is not an agreed case gotten up by collusion, but the litigation has ceased to be between adverse parties, and the case therefore falls within the rule applied where the controversy is not a real one.

The affidavit was filed to inform the court of matters which were before the district judge at the time of the dismissal of the petition and to show that the real litigation and only parties remaining in interest were the insurance company and the insured, Harry J. Aaron, with the exception noted in the affidavit. By reason of Aaron's contracts he was forced either to stand suit upon the contracts or to settle with his customers. This he had accomplished. His claim was to be asserted against the insurance com-

pany by virtue of his insurance contract. The District Court held that the matter was quite simple and that the cause should not be complicated by a piece-meal disposition and that the rights of all parties would be fully protected in a trial of the common law action which on the motion of the insurance company had been removed from the state court to the Federal Court.

At page nine of the petition for the writ it is asserted that the decision of the Circuit Court of Appeals in the instant case is in conflict with decisions of other Circuit Courts of Appeals, and cites a number of cases which it claims sustains this position. We have examined these cases. If there be conflict with the decision of the Fourth Circuit in this case, they are likewise in conflict with the decision in the Brillhart case, the principle of which the lower court followed.

CONCLUSION.

We submit that under the Declaratory Judgments Act (June 14, 1934, C. 512, 48 Stat. 955) refusal to exercise its jurisdiction by the District Court in granting a declaratory judgment was a proper exercise of its discretion, and, indeed, that in all of the circumstances the granting of such relief would have been an abuse of discretion.

Respectfully submitted.

ALLAN D. JONES,
Newport News, Virginia.

TAZEWELL TAYLOR,
Norfolk, Virginia,
Counsel for Harry J. Aaron, Respondent.